

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

DAVID KLINE)	
Claimant)	
VS.)	
)	Docket No. 247,906
CITY OF LIBERAL)	
Respondent)	
AND)	
)	
EMC INSURANCE COMPANY)	
Insurance Carrier)	

ORDER

Respondent and its insurance carrier appealed the August 20, 2001 Award entered by Administrative Law Judge Pamela J. Fuller. The Board heard oral argument on March 19, 2002.

APPEARANCES

Jeff K. Cooper of Topeka, Kansas, appeared for claimant. James M. McVay of Great Bend, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the Award.¹ The record also includes the August 10, 2001 deposition of claimant.

¹ The parties' January 22, 2001 Stipulation states task reports from both Monte Longacre and Karen Terrill were to be attached to the Stipulation and admitted into the evidentiary record without additional foundation. But neither report was attached and, instead, a task loss analysis prepared by Bud Langston was affixed to the Stipulation. The parties explain those discrepancies at pages 8 and 9 of the May 1, 2001 regular hearing transcript. In any event, those discrepancies are moot as the parties stipulated claimant has a 47 percent task loss.

ISSUES

This is a claim for a March 1, 1998 accident and neck and back injuries. The parties stipulated claimant's average weekly wage on the date of accident was \$734.04 without fringe benefits and \$781.05 with fringe benefits. The parties also stipulated claimant sustained a 47 percent task loss as a result of the work-related accident. Accordingly, the principal issue left for Judge Fuller in determining claimant's permanent partial general disability was claimant's post-injury earnings and the resulting wage loss percentage, if any.

In the August 20, 2001 Award, the Judge determined claimant had a 45 percent wage loss following December 31, 1999. Therefore, the Judge awarded claimant a 46 percent permanent partial general disability commencing January 1, 2000.

Respondent and its insurance carrier contend Judge Fuller erred. They argue claimant received economic gain from certain expenses incurred in operating the liquor store that he opened in October 1998 and, therefore, claimant's post-injury earnings should be increased to the extent of that gain. Accordingly, they argue claimant's post-injury earnings for the period commencing January 1, 2000, should be \$668.12 per week, creating only a 14 percent wage loss. Respondent and its insurance carrier request the Board to decrease claimant's permanent partial general disability to 30½ percent.

In his brief filed with the Board before oral argument, claimant contends the Judge correctly determined the post-injury earnings that should be used for purposes of the permanent partial general disability formula and, therefore, claimant requests the Board to affirm the Award. Conversely, in a letter forwarded to the Board following oral argument, claimant advised he would agree that \$5,018, which was withdrawn from the liquor store to pay personal health insurance premiums, should be included in calculating his 2000 post-injury earnings. Accordingly, claimant contends his post-injury earnings are \$525.02 per week and he, therefore, has a 33 percent wage loss for determining his permanent partial general disability.

At oral argument before the Board, the parties acknowledged that claimant's post-injury earnings for the period before January 1, 2000, are not in issue.² Accordingly, the only issue before the Board on this appeal is the amount of claimant's post-injury earnings

² At oral argument to the Board, the parties acknowledged that claimant's permanent partial general disability for the period before January 1, 2000, was sufficient to entitle claimant to receive the maximum number of weeks of benefits for such period regardless of whether one used the earnings loss percentages determined by the Judge or whether one used the post-injury earnings loss percentages proposed by respondent and its insurance carrier.

for the period commencing January 1, 2000, for purposes of determining claimant's permanent partial general disability.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record, the Board finds and concludes:

1. For the reasons below, the Award should be modified to reduce claimant's permanent partial general disability from 46 percent to 40 percent for the period commencing January 1, 2000.
2. On March 1, 1998, claimant sustained neck and back injuries while working as a firefighter for the City of Liberal, Kansas. The parties stipulated that claimant's accident arose out of and in the course of employment with respondent. The parties also stipulated claimant sustained a 10 percent whole body functional impairment due to the neck and back injuries he sustained in the accident.
3. As a result of his injuries and permanent medical restrictions, claimant was unable to continue working for respondent. Respondent terminated claimant's employment in August 1998, and claimant began seeking another job. Claimant did not find another job but in October 1998 he opened a liquor store.
4. For the period commencing January 1, 2000, claimant's liquor store became his primary source of income. For the year 2000, claimant withdrew \$22,283 for his personal expenses and benefit, plus he paid an additional \$5,018 for family health insurance. The Board finds and concludes claimant's personal withdrawals from his liquor store for the year 2000 was \$27,301, which should be used as claimant's post-injury earnings for purposes of determining claimant's permanent partial general disability. Dividing \$27,301 by 52 weeks yields average weekly earnings of \$525.02. Comparing \$525.02 to the stipulated pre-injury average weekly wage of \$781.05 yields an earnings loss of 33 percent.
5. The Board rejects respondent and its insurance carrier's argument that claimant's post-injury earnings should be increased for the personal economic benefit that he received for such things as the repair expense incurred for work on a storage shed; the legal expense incurred for converting the liquor store to a limited liability company; the equipment expense incurred to purchase a fax machine, computer, scanner and printer; the expense incurred for a cellular phone; and expenses to operate a vehicle that claimant used to deliver liquor to clubs.

The Board concludes the amounts expended for the above items should not be added to claimant's post-injury earnings. First, the Board finds that those expenses were legitimate business expenditures predominantly incurred to further business operations and

any personal benefit that claimant derived was only incidental. Second, the value of the incidental personal benefit that claimant derived from those business expenses is not quantified in the record.

6. Because claimant's injuries comprise an "unscheduled" injury, his permanent partial general disability is determined by the formula set forth in K.S.A. 1997 Supp. 44-510e. That statute provides, in part:

The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. . . . An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

Averaging the 33 percent earnings loss with the 47 percent task loss yields a 40 percent permanent partial general disability.

7. The Board adopts the findings and conclusions set forth in the Award that are not inconsistent with the above.

AWARD

WHEREFORE, the Board modifies the August 20, 2001 Award and reduces the permanent partial general disability from 46 percent to 40 percent for the period commencing January 1, 2000.

David Kline is granted compensation from the City of Liberal and its insurance carrier for a March 1, 1998 accident and resulting disability. Based upon an average weekly wage of \$781.05, Mr. Kline is entitled to receive 166 weeks of permanent partial disability benefits at \$351 per week, or \$58,266, for a 40 percent permanent partial general

disability, making a total award of \$58,266, which is all due and owing less any amounts previously paid.³

The Board adopts the orders set forth in the Award that are not inconsistent with the above.

IT IS SO ORDERED.

Dated this ____ day of April 2002.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

CONCURRING OPINION

Although the ultimate result is fair, this claim highlights the difficulties encountered in attempting to treat business proceeds as wages. The permanent partial general disability formula requires a comparison between pre- and post-injury wages. Business proceeds and personal withdrawals from business operations are not the equivalent to wages.

Wages are generated from an individual's personal labor. Business proceeds to a significant degree include the return generated from business assets. Personal cash withdrawals may or may not reflect the income produced by the enterprise or a reasonable return on the injured worker's labor. Instead, the source of personal cash withdrawals may be from money that has been borrowed to finance the business enterprise. If so, those cash withdrawals are even further removed from wages than business proceeds.

³ The Award is calculated using the last permanent partial general disability percentage as the 40 percent rating generates the same number of permanent disability weeks as generated by using the actual earnings and actual permanent partial general disability percentages for the periods preceding January 1, 2000.

As suggested by the Court of Appeals in at least one unpublished decision, in these situations the better measure of wage loss is derived by comparing one's pre-injury wage to one's post-injury ability to earn wages. That is a much better gauge of wage loss as it eliminates the economic factors that inherently affect the success of a business enterprise.

BOARD MEMBER

c: Jeff K. Cooper, Attorney for Claimant
James M. McVay, Attorney for Respondent and its Insurance Carrier
Pamela J. Fuller, Administrative Law Judge
Philip S. Harness, Workers Compensation Director